STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 1, 2005
v	No. 254122 Wayne Circuit Court
PATRICK STROZIER, Defendant-Appellant.	LC No. 03-011977-01

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), three counts of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life in prison without parole for the felony murder conviction, thirty-five to sixty years in prison for each of the second-degree murder convictions, and one to four years in prison for the felon in possession conviction, those sentences to be served concurrently, but consecutive to a two-year prison term for the felony-firearm conviction. Defendant appeals, and we vacate two of defendant's convictions and sentences for second-degree murder, but affirm in all other respects.

I. Facts and Procedural History

Defendant's convictions arise from the shooting deaths of Antoine Gill and Anthony Samuels. Gill and Samuels sold drugs out of a house in Detroit, along with William Vinson. In December 2002, Gill and Samuels were fatally shot during a robbery at the drug house and Vinson was also present at the scene. Vinson pleaded guilty of two counts of second-degree murder and agreed to testify against defendant. At defendant's trial, Vinson asserted that, earlier on the night of the shooting, defendant was at the drug house and Vinson heard him discuss a plan to commit the robbery. According to Vinson, defendant left the house, but returned a few hours later with an unidentified man. Vinson maintained that defendant and the unidentified man committed the robbery and shooting.

II. Analysis

A. Jury Instructions

Defendant argues that the trial court erred when, in connection with Vinson's testimony, it gave the cautionary instruction for a disputed accomplice, CJI2d 5.5, rather than an undisputed accomplice, CJI2d 5.4. "[T]he decision whether to give a cautionary accomplice instructions falls within the trial court's sound discretion." *People v Young*, 472 Mich 130; 693 NW2d 801 (2005).

Defendant maintains that, because Vinson pleaded guilty to two counts of second-degree murder, he was an undisputed accomplice.[1] "[A] trial court is required to give requested instructions only if the instructions are supported by the evidence or the facts of the case." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). At trial, Vinson admitted that he pleaded guilty to two counts of second-degree murder, but he denied that he played any role in the crime.[2] In *People v Perry*, 218 Mich App 520, 526-530; 554 NW2d 362 (1996), although the witness was convicted of a related offense at his own trial, this Court held that the trial court did not abuse its discretion when it failed to instruct the jury that a witness was an undisputed accomplice. Because the witness did not admit that he participated in or encouraged the underlying crimes, the Court concluded that there was a factual dispute regarding whether the witness took part in the crimes. *Id*. at 528-529. Here, Vinson similarly denied involvement in the offense, notwithstanding his guilty plea. The evidence, therefore, established a factual dispute regarding whether he took part in the crimes.

It was ultimately for the jury to decide whether Vinson may have been involved in the offense and, if so, whether that affected his credibility as a witness. *Young*, *supra* at 143. The trial court's instructions allowed the jury to make those determinations. Defendant has failed to demonstrate that the court's instructions amounted to error requiring reversal.

B. Cross-Examination

Further, defendant claims that the trial court improperly limited cross-examination and denied him his right of confrontation during his questioning of Vinson. Specifically, defendant

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[1] To support his claim, defendant relies primarily on *People v Jensen*, 162 Mich App 171, 185-190; 412 NW2d 681 (1987). In addition to the factual dissimilarities between *Jensen* and this case, *Jensen* was issued before November 1, 1990, and thus is not binding. MCR 7.215(H)(1). Further, the *Jensen* panel relied heavily on *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974), which was overruled by *Young*, *supra*, in which our Supreme Court further explained:

> Fundamentally, it is the province *of the jury* to assess the credibility of witnesses. In making that assessment, the jury should decide whether witnesses harbor any bias or prejudice. . . . And it is the role of defense counsel, through cross-examination of prosecution witnesses and closing argument, to expose potential credibility problems for the jury to consider. [*Young*, *supra* at 143 (citations omitted).]

[2] Vinson explained that it was his understanding that he was charged in the matter because he was aware of the robbery and opened the door to let defendant into the house. Vinson said he admitted to participating in the offense at his plea hearing on the advice of counsel.

complains that the trial court prohibited questions regarding the penalty for first-degree felony murder, which Vinson avoided when he pleaded guilty to second-degree murder. "Whether a trial court has properly limited cross-examination is reviewed for an abuse of discretion." *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). Further:

> While the scope of cross-examination is a matter left to the sound discretion of the trial court, that discretion must be exercised with due regard for a defendant's constitutional rights. A limitation on cross-examination which prevents a defendant from placing before the jury facts upon which an inference of bias, prejudice or lack of credibility of a witness may be drawn amounts to an abuse of discretion and can constitute a denial of the right of confrontation. If cross-examination of a prosecution witness has been unreasonably limited, a conviction based upon the testimony of such witness should not be sustained. While failure to permit adequate cross-examination constitutes error, reversal is not always required where the error is harmless or no prejudice results. [*People v Holliday*, 144 Mich App 560, 566-567; 376 NW2d 154 (1985) (footnotes omitted).]

The trial court ruled that defendant could not question Vinson about the specific penalty he faced for felony murder, but permitted defendant to establish that Vinson faced a substantially different penalty than the fifteen- to thirty-year sentences he received by pleading guilty of second-degree murder. The trial court judge also stated that she would reconsider her decision if defense counsel provided authority for his position that he could properly question Vinson about the specific penalty for felony murder.

This Court has held that it is an abuse of discretion for a trial court to deny cross-examination of a witness regarding the details of his plea bargain, including sentencing considerations received in exchange for his testimony, because such evidence is relevant to the witness' credibility. *People v Mumford*, 183 Mich App 149, 153-154; 455 NW2d 51 (1990). However, this Court has also held that this error is subject to a harmless error analysis. *Minor, supra* at 688, citing *Delaware v Van Arsdall*, 475 US 673, 684; 106 S Ct 1431; 89 L Ed 2d 674 (1986), and *Crane v Kentucky*, 476 US 683, 692; 106 S Ct 2142; 90 L Ed 2d 636 (1986); see also *Holliday, supra* at 567.

Here, were we to conclude that the trial court abused its discretion by precluding defendant from inquiring into the penalty Vinson avoided by entering his plea agreement, any error was harmless beyond a reasonable doubt. Aside from the specific penalty, the trial court allowed defendant to establish all details of Vinson's plea bargain. Further, the court permitted defendant to show that Vinson received a significantly reduced sentence for pleading guilty to second-degree murder. Though defense counsel did not take full advantage of the scope of examination permitted by the trial court, Vinson's testimony disclosed that he received a significant reduction in his sentence compared to what he faced for felony murder. In particular, Vinson admitted that he received sentences of fifteen to thirty years and avoided a potential life sentence as part of his plea bargain. In light of this testimony, the jury was sufficiently informed of the sentencing considerations Vinson received under his plea agreement for purposes of evaluating his credibility. The trial court's refusal to allow inquiry into the specific penalty of mandatory life imprisonment for felony murder was harmless beyond a reasonable doubt. *Minor, supra* at 688.

Regarding the same issue, defendant also says that trial counsel was ineffective for failing to cite appropriate authority to the trial court in support of his position and for failing to adequately cross-examine Vinson within the limitations set by the trial court. Because defendant did not raise this issue below, our review is limited to mistakes apparent from the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).[3]

Were we to find that counsel was deficient for failing to provide appropriate supporting authority for his argument, or for failing to take full advantage of the scope of cross-examination permitted by the trial court, defendant has not shown that he was prejudiced because the record shows that the jury was sufficiently advised of the details of Vinson's plea bargain agreement, including the sentencing considerations Vinson received in exchange for his testimony against defendant. Though the testimony did not disclose the specific penalty of life imprisonment without parole for felony murder, there is no reasonable likelihood that the result would have been different in light of Vinson's acknowledgment that he avoided a potential life sentence by accepting a sentence agreement of fifteen to thirty years. Therefore, defendant has not established that he was prejudiced by counsel's allegedly deficient conduct.

C. Motion to Suppress

Defendant maintains that the trial court erroneously denied his motion to suppress evidence of a jacket seized from his house. "A trial court's findings of fact in a suppression hearing are reviewed for clear error; but its ultimate decision on a motion to suppress is reviewed de novo." *People v Dunbar*, 264 Mich App 240, 243; 690 NW2d 476 (2004).

At an evidentiary hearing on this issue, testimony disclosed that the police were provided with a description of a jacket or coat that defendant allegedly wore at the time of the shootings. The police went to defendant's home and defendant's mother and daughter permitted the officers to search the basement, where defendant lived. While in the basement, one of the officers noticed a jacket that matched the description of the jacket that was previously given to the police. Before the officer picked it up, she told her partner that it was the jacket that defendant supposedly wore on the night of the shootings. The officer then picked up the jacket and looked for bloodstains or anything unusual on it. According to the police, defendant's mother gave them permission to take the jacket. Defendant's mother admitted that she permitted the officers to search the home, but denied that she allowed them to take the jacket.

The trial court denied defendant's motion to suppress and found that defendant's mother gave the officers permission to search the home and that the officers found the jacket in plain

[3] To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

view. The court also held that the jacket was properly seized because it matched the description of the jacket that defendant was wearing at the time of the shootings.

The plain view exception to the warrant requirement is summarized in *People v Champion,* 452 Mich 92, 101-102; 549 NW2d 849 (1996):

> The plain view doctrine allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the item's incriminating character is immediately apparent. *Horton v California,* 496 US 128; 110 S Ct 2301; 110 L Ed 2d 112 (1990); *People v Cooke,* 194 Mich App 534; 487 NW2d 497 (1992). A fundamental characteristic of the doctrine is that it is exclusively a seizure rationale. No searching, no matter how minimal, may be done under the auspices of the plain view doctrine. See, e.g., *Arizona v Hicks,* 480 US 321; 107 S Ct 1149; 94 L Ed 2d 347 (1987). Another fundamental characteristic of the doctrine is that, unlike most exceptions to the warrant requirement, it is not predicated on exigent circumstances. Instead, it is permitted in the interest of police convenience. *Coolidge v New Hampshire,* 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971). It would be unreasonably inconvenient to require the police, once they have made a valid intrusion and have discovered probable evidence in plain view, to leave, obtain a warrant, and return to resume a process already in progress. [Footnote omitted.]

The police must have probable cause to believe that the item is seizable without moving or searching it. *Champion, supra* at 102-103.

Defendant maintains that the trial court failed to properly apply the plain view exception because it did not consider whether it was immediately apparent to the officer that the jacket was incriminating evidence. We disagree. The trial court found, and the testimony supports, that, before the seizure, the officer recognized that the jacket matched the description of the jacket defendant allegedly wore at the time of the shootings, and thus was aware of its incriminating nature. Defendant also claims that, apart from the officer's testimony, the record is devoid of any evidence that the jacket matched the description of defendant's clothing. But the court was entitled to rely on the officer's testimony about the witness' description of defendant's clothing. In light of the officer's testimony, the trial court did not clearly err in finding that the officers had information regarding the description of defendant's clothing before seizing the jacket.[4]

[4] Defendant further contends that his motion to suppress should have been granted because the officer admitted picking up the jacket in order to look at it for bloodstains or other evidence connecting it to the shootings. Defendant therefore claims that the officer improperly conducted a search of the jacket before seizing it. As previously indicated, an officer must have probable cause to seize an item in plain view without moving or searching it. *Champion, supra* at 102-103. In this case, the officer had probable cause to seize the jacket before he searched it. Again, the officer testified that she recognized the jacket as matching the description given to the police before she seized it. At that point, she picked up the jacket and looked at it for other indications

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We also find unavailing defendant's assertion that the jacket should have been suppressed because the police had time to obtain a warrant. Regardless whether the police could have obtained a warrant, the plain view doctrine does not require the police to do so. As discussed in *Champion, supra* at 101-102, the doctrine allows the police to immediately seize evidence in plain view as a matter of convenience.

D. Alibi Witnesses

Defendant complains that the trial court erred in its evidentiary rulings regarding his alibi witnesses. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. However, if the court's decision involves a preliminary question of law, we review that decision de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

Defendant specifically argues that the trial court prevented him from eliciting a prior consistent statement from his alibi witness under MRE 801(d)(1)(B). However, defendant did not present this argument below as a basis for allowing the testimony, nor did he present an offer of proof regarding the content of the prior statement. MRE 103(a)(2). Moreover, it is not apparent that Hill's prior statement would be admissible under MRE 801(d)(1)(B). "[A] consistent statement made after the motive to fabricate arose does not fall within the parameters of the hearsay exclusion for prior consistent statements." *People v McCray*, 245 Mich App 631, 642; 630 NW2d 633 (2001), quoting *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996). Here, it appears that any statement the witness previously gave to defendant's lawyer was made after a motive to fabricate arose. Accordingly, defendant has not demonstrated that the prior statement was admissible under MRE 801(d)(1)(B).

Defendant further contends that the trial court improperly barred him from establishing when the police and prosecution had notice of his alibi witnesses. However, were we to conclude that the trial court erred in ruling that the evidence was not relevant, reversal is not required. In cases involving preserved, nonconstitutional error, the defendant must demonstrate that it is more probable than not that the error was outcome determinative. *People v Phillips*, 469 Mich 390, 396; 666 NW2d 657 (2003). The error must be assessed in light of the strength and weight of the untainted evidence. *Id*. An error is presumed harmless and the defendant has the burden of showing that it resulted in a miscarriage of justice. *People v Albers*, 258 Mich App 578, 590; 672 NW2d 336 (2003).

Here, defendant presented evidence that the police and prosecutor never interviewed the witness even after she was identified as an alibi witness. The outcome would not have been different had defendant been allowed to present evidence that the prosecutor had this information at an earlier date. Accordingly, reversal is not required.

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that it was connected to the shootings. Because the officer already had probable cause to seize the jacket before picking it up, the subsequent cursory examination of the jacket did not constitute an improper search for purposes of the Fourth Amendment, but rather involved a postseizure movement of the item unrelated to the issue of probable cause to seize it. See *People v Fletcher*, 260 Mich App 531, 549-551; 679 NW2d 127 (2004).

E. Prosecutorial Misconduct

Defendant also claims he is entitled to a new trial because of misconduct by the prosecutor.[5] Claims of prosecutorial misconduct are decided case by case. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267 nn 5-7; 531 NW2d 659 (1995).

Defendant says that the prosecutor improperly used Vinson's prior statements to rehabilitate him as a witness after defense counsel impeached his testimony at trial. Prosecutorial misconduct cannot be based on good-faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *People v Missouri*, 100 Mich App 310, 328; 299 NW2d 346 (1980). The prosecutor, as an advocate for the state, is entitled to attempt to introduce evidence which he legitimately believes will be accepted by the court, so long as that attempt does not actually prejudice the defendant. Absent a showing of bad faith by the prosecutor, this Court will not reverse simply because defense counsel was required to do his job and object. *Id.* at 328-329.

Defendant does not argue that the evidence of Vinson's prior statements was offered in bad faith, only that it was not admissible under the rules of evidence. Accordingly, defendant has failed to establish misconduct. Furthermore, it is not apparent from the record that Vinson's prior police statements were offered as substantive evidence. At trial, the prosecutor only asked the court to admit portions of Vinson's preliminary examination testimony as substantive evidence. Therefore, defendant has not shown a plain error affecting his substantial rights.[6]

F. Ineffective Assistance of Counsel

Defendant asserts that his attorney was ineffective for failing to request DNA testing on the coat seized from his home. Because defendant did not raise this issue below, our review is limited to mistakes apparent from the record. *Wilson, supra*.

Though nothing in the record shows that defense counsel requested that the coat be submitted for DNA testing, defense counsel addressed this issue in his cross-examination of

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[5] Because defendant did not preserve this issue with appropriate objections to the prosecutor's conduct at trial, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999); *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

[6] We also find no merit to defendant's argument that the prosecutor improperly elicited false testimony. Nothing in the record establishes that Vinson falsely testified that defendant wore a tan trench coat on the night of the shootings. Additionally, the record does not indicate that the prosecutor acted in bad faith when questioning defendant's alibi witnesses about inconsistencies regarding defendant's whereabouts at the time of the shootings. *Noble, supra*.

Having found no merit to defendant's claims of prosecutorial misconduct, we likewise reject his argument that trial counsel was ineffective for failing to object to the prosecutor's conduct. *Pickens, supra*; *Johnson, supra.*

William Steiner, the police department's forensic chemist who tested the coat for gunshot residue. Defense counsel elicited that the police did not perform DNA testing of the coat to connect it to a specific individual, and Steiner admitted that in order to connect the coat to defendant, DNA testing should have been performed on it.

The record clearly shows that defense counsel was aware that there was no DNA testing of the coat to connect it to defendant, and his decision to highlight that point at trial, rather than request DNA testing himself, was a matter of trial strategy, which this Court will not second-guess. Further, there is no basis in the record to conclude that DNA testing would have eliminated defendant as a suspect. Thus, defendant has not shown ineffective assistance of counsel.

G. Double Jeopardy

Though not raised by defendant, it is clear that defendant's dual convictions of first-degree felony murder and second-degree murder arising from the death of Anthony Samuels, and his two convictions of second-degree murder arising from the death of Antoine Gill, violate defendant's double jeopardy rights. *People v John Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000); US Const, Am V; Const 1963, art 1, § 15. Accordingly, we vacate two of defendant's convictions and sentences for second-degree murder and remand for correction of the judgment of sentence. Defendant's remaining convictions and sentences are affirmed in all other respects.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey